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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1942.

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KURT EMIL BRUNO MOLZAHN,  
Petitioner,

against

UNITED STATES OF AMERICA.

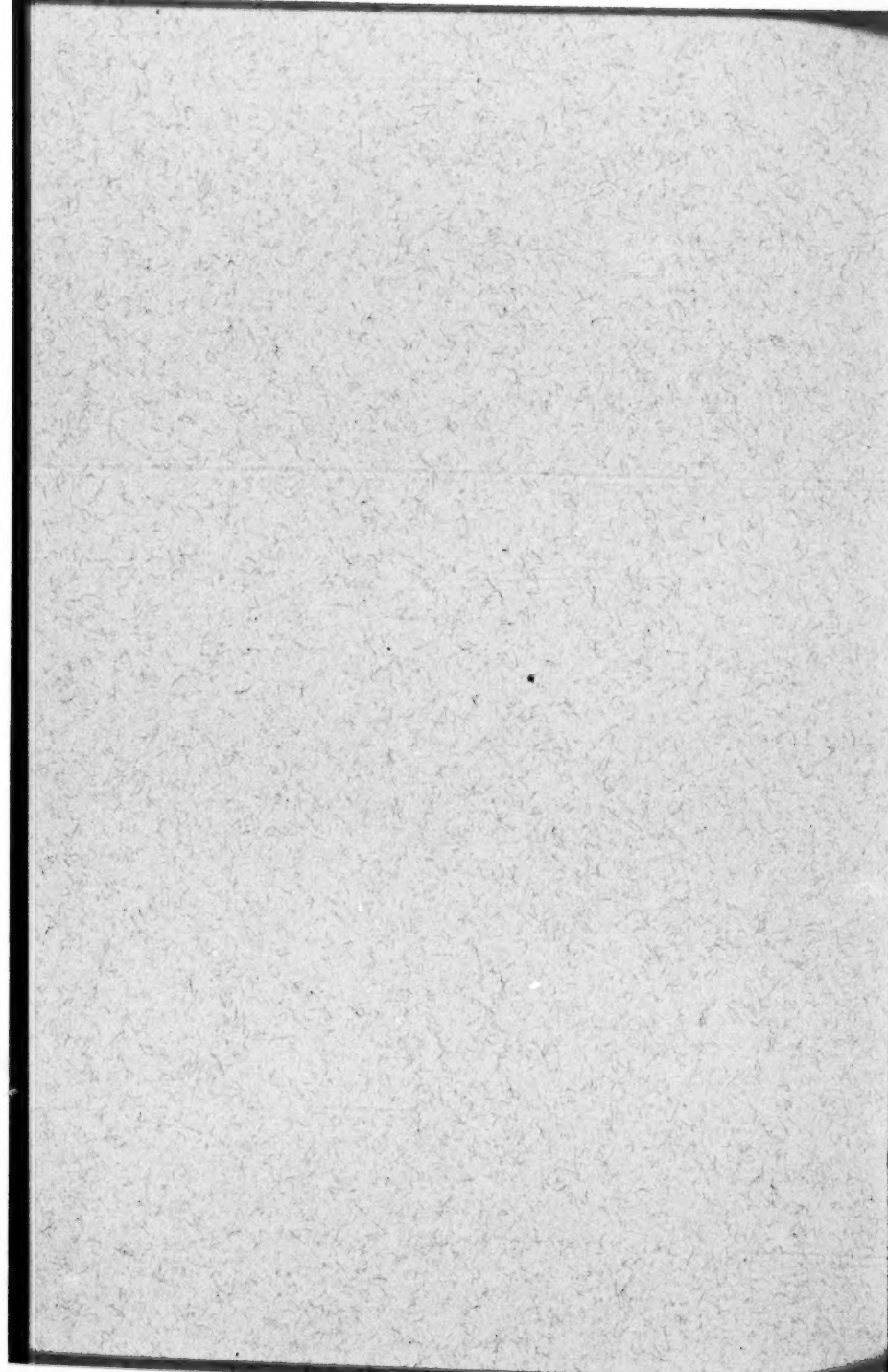
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT  
AND BRIEF IN SUPPORT THEREOF.

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FRANCIS FISHER KANE,  
T. HENRY WALNUT,  
*Attorneys for Petitioner,*  
1420 WALNUT STREET,  
PHILADELPHIA, PA.

JAMES W. CARPENTER,  
CYRIL COLEMAN,  
*Attorneys for Petitioner,*  
750 MAIN STREET,  
HARTFORD, CONN.



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### Summary and Statement of the Matter Involved.

The petitioner was indicted with four other defendants, Anastase A. Vonsiatsky, Gerhard Wilhelm Kunze, Wolfgang Ebell and Otto Willumeit, in the District Court for the District of Connecticut on June 10, 1942. The indictment, which was drawn under Section 34 and subsection (a) of Section 32 of Title 50 of the United States Code, charged the defendants with conspiring between the dates of January 1, 1941, and December 7, 1941, to transmit information relative to our national defense to the governments of Germany and Japan, with intent that the information would be used to the injury of the United States and the advantage of the two other nations. The five defendants would obtain and collect such information, the defendant Kunze would be provided by the defendant Vonsiatsky with funds for collecting the information, and taking it to Mexico and from that country transmitting it to the two countries named. The other defendants would assist Kunze in going to Mexico, and after his arrival there they were to send him additional information relating to the national defense.

Previously to the finding of the indictment, a subpoena notice had been served on your petitioner to appear in Hartford, Connecticut, May 26, 1942, before the Grand Jury in a case captioned U. S. v. Grand Jury. When he reached Hartford he was asked by representatives of the Federal Bureau of Investigation whether he had any objection to being examined before the Grand Jury. He answered that he had not, and he waived any right that he might have had to object to such questioning. He went before the Grand Jury and answered the questions asked him to the best of his ability. He left Hartford on the same day and reached his home in Philadelphia late that night. On the following day, about one o'clock in the afternoon, two representatives of the F.B.I. came to his house and asked leave to examine his books, papers and other articles. He said he had no objection to their

doing so, and he waived any rights that he might have had to object to the search being made. The men accordingly searched his house from top to bottom and selected certain books, papers and other articles which they took away with them to be used later by the Government as the representatives might see fit. At this time your petitioner was not represented by counsel.

On June 11th, the day after the indictment had been found, your petitioner was arrested in Philadelphia and committed to the County Prison, the bail being set at \$25,000 and he being unable to secure the needed surety. Later, on June 15th, \$25,000 in cash having been raised by his friends and deposited with the United States Commissioner in lieu of bail, your petitioner was released, he giving his personal recognizance to appear when required to do so in the District Court for the District of Connecticut. He had on that day secured counsel to represent him.

On June 22nd your petitioner was arraigned and pleaded not guilty to the indictment. Certain of the defendants pleaded not guilty and afterwards withdrew their pleas and filed pleas of guilty. On July 29th, when your petitioner was placed on trial, they all had pleaded guilty. Your petitioner's case came on for trial on July 29th before Hon. J. Joseph Smith, District Judge, the trial lasting nearly four weeks.

The Government produced evidence showing that three of the four defendants had participated in a conference on July 26, 1941, at the Hotel Bismarck in Chicago. Plans were then and there discussed which constituted the gist of the conspiracy. The Government also showed acts done in furtherance of the plans by all four conspirators but it did not show by direct evidence that your petitioner was party to the plans or did anything to further them. The evidence against him, so far as participation in the conspiracy is concerned, is that found in the testimony of the witness Alexsy Pelypenko, who described himself as an Ukranian, as having been originally a priest of the



Russian or Greek Orthodox Church and as subsequently becoming a priest of the Roman Catholic Church in 1925. He was referred to throughout the trial as the priest or Father Pelypenko. The testimony of this witness consisted of his version of a conversation that he had with your petitioner and the case rests on the sufficiency of that conversation to show your petitioner's knowledge of and participation in the conspiracy. Upon that conversation as a base there was built up a mass of oral testimony to show "intent." In addition the pamphlets, pictures, photographs and other articles found by the representatives of the F.B.I. in the petitioner's home were introduced. Petitioner's counsel contended that neither participation in, nor knowledge of the conspiracy had been shown, and at the close of the Government's case moved for a directed verdict of not guilty. The motion was declined by the Court and an exception allowed. Evidence was then offered for your petitioner, a number of witnesses being examined in his behalf and he himself denying from the stand the version of the conversation as given by Father Pelypenko. There was nothing in the evidence for the defense that strengthened the Government's case, and after the evidence submitted by the defendant and a short amount of evidence in rebuttal had been placed before the jury, petitioner's counsel moved again for a directed verdict of acquittal. The motion was denied and an exception allowed.

The case went to the jury on arguments of counsel and a charge from the court, and the jury brought in a verdict of guilty. This was on August 23rd. Motions were thereupon made by petitioner for enlargement on bail and to set aside the verdict and grant a new trial. The court refused the motion to enlarge on bail, and set August 25th for hearing argument on the motion to set aside and grant a new trial. Argument was had on the day mentioned, and the Judge at the conclusion of the argument refused the motion, stating orally his reason for the refusal. An exception to the Court's action was asked and allowed.



The Court thereupon sentenced your petitioner to ten years' imprisonment. He was committed temporarily to the Federal Correctional Institution at Danbury and later transferred to the Federal Prison at Lewisburg, Pa., where he is at present.

All the other defendants, as has been said, had pleaded guilty before the petitioner was put on trial. Vonsiatsky had been sentenced and given 5 years' imprisonment. Willumeit, Kunze and Ebell were in custody during the trial, and after it was over they were sentenced by the Court, Willumeit receiving a sentence of 5 years' imprisonment, Ebell a sentence of 10 years and Kunze a sentence of 15 years.

The petitioner later appealed to the Court of Appeals for the Second Circuit, asking that the judgment be reversed. Printed briefs were filed by his counsel and by counsel for the Government, and the case was orally argued on February 11, 1943, before Hon. Thomas W. Swan, Hon. Augustus N. Hand, and Hon. Charles E. Clark. A decision was rendered on April 2, 1943, affirming the judgment of the court below, an opinion being filed in behalf of the Court by Hon. Augustus N. Hand, which in addition to being found in the printed Record is printed in the Appendix to this Petition and Brief. A petition for rehearing was filed by your petitioner and the petition was denied by the Court on April 22, 1943.

The petitioner craves the indulgence of the Court that he be allowed to add to what has been already said the following, less formal statement.

Your petitioner is not conscious of having done anything or of having joined with anyone in the doing of anything that violated his oath of allegiance to the United States or violated the laws of his country. He avers that a great injustice has been done him and that through him an injustice has been done the congregation of the Lutheran Church of which he was and still is the pastor and to the great church of which he is a clerical member.

There was evidence, it is true, of an agreement to

transmit information to Germany and Japan entered into by Vonsiatsky, Willumeit and of acts of participation by Ebell, but your petitioner was not a party to the agreement nor was he shown to have done anything. He did not know, nor had he ever heard of Vonsiatsky, Willumeit or Ebell until he was indicted with them. He had met Kunze, but his acquaintance with him was slight and he had not seen him for many years prior to the date of the trial and the time of the conspiracy.

As your petitioner views the case in the light of the opinion of the Circuit Court of Appeals the evidence that was considered significant in determining his guilt was that relating to your petitioner's "intent" in doing what he did and the conversation with Father Pelypenko referred to above, to show what he did.

In reviewing this evidence Judge Hand, in his opinion, first analyzed that relating to "intent." He listed as important a shipboard conversation between your petitioner and a Dr. Flatter occurring in the early summer of 1937; your petitioner's acquaintanceship with a man named Kessemeyer, said to be a pronounced Nazi; a conversation between your petitioner and Bishop Pfatteicher in the year 1939 (he was naturalized in 1940), wherein your petitioner weighed the question of his supreme loyalty; a statement made by someone that he seemed to have been known among Bund members as friendly to them; a number of documents, photographs and a Nazi pennant found in your petitioner's home; an address delivered in 1934; and a service in his church in 1937 in memory of Germans who lost their lives in the last war, at which representatives of the Bund were said to have been present in uniform and to have participated.

All of the matters listed were fully answered, but aside from his answer, your petitioner is troubled to find that these items are given weight as showing his "intent" in participating in a conspiracy in which he had no part.

Moreover he cannot understand how a shipboard conversation in 1937, relating, as told by Dr. Flatter, to your

petitioner's German family and political connections and interests could bear upon the issue of the case, nor why it should be significant that another man among your petitioner's thousands of acquaintances was said to be a pronounced Nazi.

Again it seems unfair to hold against your petitioner testimony that he weighed the question of his supreme loyalty in his own mind before applying for his final papers. It may well be true that he searched his own conscience before doing so. Only those who have been called upon to make a similar decision can appreciate the sober spirit in which it is reached. He was not an outcast from his native land. He came of a family of upright law-abiding people who were slow to give their word but once given abided by it. He had chosen America for his life's work but he was interested in and perhaps flattered by offers made to him of posts of importance in Germany. He declined them. He had work to do here and a wide field of opportunity. He was Pastor of Old Zion Lutheran Church, one of the famous churches of America. Its history is part of the history of the Province and Commonwealth of Pennsylvania and of the Nation itself. He was preparing for the celebration of its 200th anniversary when his present trouble came upon him. It is a beautiful church located in the old part of the city and has been preserved, as have other old churches in the same section, by a congregation long since removed from its neighborhood but who maintain it as a venerated emblem of their faith. The members of his congregation consist of those whose families have resided in the city for more than two centuries as well as those who have only recently come to this country.

It must be clear, not only that your petitioner was bound by his oath as an honorable man to his allegiance to the United States after he had taken it, but he was bound by his obligation to his congregation, so largely of old American ancestry. As their pastor he owed them

a return for the faith they showed in him when they asked him to take the pastorate of their church in 1929 and when they loyally supported him in his plans for the church. He is touched by the faith they have continued to show in him.

Surely the statement that he deliberated before taking his oath of allegiance should not be considered as evidence that, once having taken it, he lightly repudiated it, repudiated his vows to his church and broke faith with the congregation that trusted him.

Also your petitioner believes that the display of photographs of Hitler and Goebbels, of a Nazi pennant and various documents found in his home, as evidence against him, was particularly unfair. He had a substantial library for a man of his rather modest means, books in Hebrew, French, German and English. He was alive to, and interested in the fast moving events of the world. He subscribed to magazines and newspapers and was on a number of mailing lists, naturally on those of organizations dedicated to Germany. He received quantities of literature through the mail, much was read, some discarded and some awaited reading. The accumulation was placed in a closet where it was added to from year to year for 13 years. There were thousand of books and individual pieces of literature, and of all this profusion some 12 pieces taken from the closet were brought into court. They were offered and accepted as evidence of your petitioner's "intent." Can any man of wide social and literary interests be condemned, by picking a few items from a great miscellany found in his collection? And yet in this case the items were placed on display before the jury at the time of the trial as an ocular demonstration that a Nazi spy was being tried, and they seem to have been considered by the Circuit Court of Appeals in the same light.

Your petitioner believes he is justified in saying that he was not tried and convicted for anything he did but for

what it was thought he was and that the Circuit Court of Appeals itself treated the evidence of "intent" as if it carried a presumption that he had broken his oath of allegiance to the United States and had committed the crime charged against him.

The Circuit Court of Appeals after reviewing the foregoing evidence of "intent" takes up the testimony of Father Pelypenko; his coming to the United States in March 1941; his meeting with Willumeit in Chicago in April; and his visit to Philadelphia in May, 1941. The testimony of the priest as to this visit was to the effect that he called on the German Consul and secured from him the name of your petitioner with the comment that he was "one of our most important co-workers—one of the closest co-workers of the German Consulate." Your petitioner knows nothing of the statements made by the Consulate, but it does appear that on the slip of paper, which the priest brought into court and showed as having been given him at the Consulate, appears not only your petitioner's name but the name of "Herman H. Koenes, 4400 N. 5th Street" (p. 8). This latter name is that of a friend of your petitioner, a Roman Catholic priest, with whom your petitioner frequently has gone on fishing trips. Father Koenes is not disloyal and yet he was required, as your petitioner was, in the fulfillment of his duties to those who called upon him for aid and advice to consult frequently with the German Consul. Whether Pelypenko visited and reported upon conversations he had with Father Koenes is something your petitioner does not know.

The further testimony of the priest relative to his interview with your petitioner in May in no way relates to the conspiracy charged in the indictment, nor does it purport to do so. As evidence it is directed to the question of "intent."

Your petitioner is certain that the version of the conversation as given by the priest is not correct, and he so testified. In fact he can recall but one interview with the

priest. He still believes that his recollection is correct. To the foregoing there is added the further testimony of the priest that he called at the German Embassy in Washington and discussed your petitioner with Von Haydn, the Secretary of the Embassy. Certainly your petitioner knew nothing of this and could not have done anything about it if he had.

The court then proceeds to abstract the further testimony relating to the priest's meeting with Kunze: his attendance at the Hotel Bismarck conference in Chicago on July 26, 1941, which was also attended by Vonsiatsky, Willumeit and Kunze, where plans were discussed and the question of securing a passport for Kunze was considered. It was suggested that Kunze should get some document, "Polish or Czech or some other that would enable him to pass through 'as an ally'." The priest was given \$50.00 by Kunze upon the promise that he could and would aid him in getting such a document.

It would appear that at this meeting the name of your petitioner was discussed. Whether his name was introduced by the priest or by Kunze depends upon whether the priest's version of the conversation or that of Kunze is believed. In any event your petitioner was entirely innocent of having any part in starting the discussion, the result of which was that Kunze said he would write a letter to your petitioner which according to his own testimony he did under date of July 31, 1941. On that same day he sent a letter to the priest——

"at the Hotel Bristol in New York, which bore on the back flap the words, 'K. c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Philadelphia, Pa. The envelope contained two small passport photographs of Kunze and was followed by a similar letter post-marked August 2, 1941, directed to Pelypenko at the Hotel Bristol, containing three larger photographs and having a like forwarding address to Molzahn on the back flap. These letters were received by Pely-

penko at New York, who had arrived there from Chicago. There was proof indicating that Kunze in the meantime had written Molzahn about the plan for obtaining passports (Rec. P. 23). Although Kunze claimed that his letter was merely one of introduction and Molzahn denied that he ever received such a communication."

Your petitioner has recited the foregoing extract from the Court's opinion because from his point of view the evidence of what occurred at Chicago should not be accepted as evidence against him since he was not present and never knew anything of the meeting until it was testified to at the time of the trial. Kunze is the only one who knows what was in the letter that he says he wrote to your petitioner. He has testified that there was no reference in it to any of his plans or any arrangements made by him and the priest incident to securing a passport. It would seem that there was no necessity to inform your petitioner of those plans for it was not suggested that he was to get the passport. That was the priest's undertaking.

Your petitioner, as he testified, has no recollection of receiving the letter. He was on his vacation at the time, his home was closed. He had no office staff. That may account for it.

Your petitioner notes that the court then proceeds with its consideration of the testimony as follows:

"After receiving the first of the two letters containing the photographs Pelypenko called to see Molzahn at his office in Philadelphia but found him on vacation and left with his assistant the two small photographs of Kunze which were mailed with the first letter to the Hotel Bristol. On receiving the second letter he again called on Molzahn found him still absent and left at the office two of the three larger photographs contained in the second letter, retaining the third him-



self. He returned about six weeks later and found Molzahn'' \* \* \*

It is to be noted that the priest did not say that he left the photographs with your petitioner's assistant. He says that he left them with "a certain person whose name I do not know. He was sitting there and writing" (Rec., p. 16). There is moreover no evidence that your petitioner received the photographs and definitely there is no evidence that any instructions as to their use were submitted with them. This would seem strange since the agreement made by Pelypenko was that he, himself, would get the passports. It is true as will hereafter be pointed out that the priest did visit the church on August 4. The man who was there at the time was not your petitioner's assistant, he was chairman of the Church Council or Vestry. He did not deliver any photographs to your petitioner. He received none from the priest.

Your petitioner believes that none of the foregoing evidence relating to the conspiracy is brought home to him. All of the matters testified to could have happened, in fact did happen, without his knowing anything about them whatever. It will be noted that at the conclusion of the foregoing citation from the Court's Opinion the case is brought right up to the one significant bit of testimony, namely, the conversation that took place at the time that the priest found your petitioner in his office.

The testimony in addition to that conversation discussed by the court related to what Father Pelypenko did with Vonsiatsky and what was said between them; what Kunze and Willumeit did and said in a trip about the country and what they did with Ebell; what Kunze and Ebell later did; none of which by any stretch of the imagination involves your petitioner unless he can be held to have participated in all of it by reason of the fact that his conversation with the priest established that he was a co-conspirator with the other four.

Your petitioner will leave the detailed consideration of the priest's version of the conversation to later discussion, but he wishes to emphasize that it seems fundamentally unjust that he should be convicted of a crime and sentenced to 10 years' imprisonment on the uncorroborated version of a conversation. He realizes that if this is true any one of the thousands of persons he has interviewed over the past years might have appeared as a witness against him and implicated him in a conspiracy, of which he knew nothing, merely upon a version of a conversation, product of a distorted memory or a pure fabrication. He would be unable to deny the conversation—he could merely deny its meaning. He could not corroborate his denial—neither could the witness against him corroborate his assertion. The question of veracity would be for the jury. If this is sound no man can be safe in a time when prejudice runs high. The professional informer would have his field day. He has flourished under similar conditions in many periods of history.

Your petitioner wishes to draw attention to what appears to him to have been a heedless display of zeal in trapping him that disregarded the commonly accepted rules of justice. It has already been pointed out that he appeared before the Grand Jury and told his story freely; that he permitted a search of his home and offered no objection to the removal of any articles desired by the agents of the government. When he was indicted the Government knew that he had asserted his innocence; knew that in all reason he could not and would not try to escape and yet he was held under sensational headline bail. At that time your petitioner had no knowledge of the evidence against him. He learned of it at the trial, and he realizes that the issue is narrowed to a question of veracity as between himself and Father Pelypenko, and neither is able to invoke corroboration. He realizes also that the priest had prepared a number

of things all of which when pieced together were used to direct suspicion to your petitioner. He had secured a slip of paper from the German Consulate bearing your petitioner's name; he had secured a slip of paper in your petitioner's handwriting bearing the name of Pastor Evers; he had secured the writing of two letters by Kunze bearing your petitioner's name as a return address; he had secured the writing of a letter by Kunze to your petitioner; he had secured a slip of paper from Dr. Haussmann bearing the name and address of your petitioner, and finally he had secured an interview with your petitioner and so phrased his version of the conversation that it was construed as making all of his other accomplishments competent evidence against your petitioner. The agents of the government obviously were in close contact with their informer. The letters and the enclosed envelopes sent by Kunze to the priest were photostated, and the priest came to Philadelphia on his several visits for the purpose of clinching the case. And finally having had his interview he appears to have reported it in such terms as to satisfy the government agents that they had trapped their prey.

It is probable that the priest did not tell them that he had been paid \$50 to secure a passport for Kunze. More probably he told them that your petitioner was to secure the passport, and he probably reported that your petitioner at the time of the interview had acknowledged receiving the passport pictures—otherwise why should the prosecution have pressed home the question three times in the course of his testimony in chief?

Another matter which the priest probably did not report in his first version of the interview was something that was relied upon by the Circuit Court of Appeals. It appears in the priest's testimony as follows—"I just asked how I can communicate with Kunze—he gave me the address of Dr. Ebell in El Paso." As of the time of the interview in the first half of September such in-

formation did not make sense. Kunze was to be reached through Bund Headquarters at Chicago. He did not start west on his tour until the beginning of October (Record, p. 95). He returned to Chicago November 3rd. Both Pelypenko and the Government agents probably knew that Kunze could be reached in Chicago.

In determining the question of veracity your petitioner wishes to point out that the Circuit Court of Appeals in describing Father Pelypenko stated that he "came to this country from Buenos Aires and entered the service of the Federal Bureau of Investigation. He was sent to the United States by the American Embassy in the Argentine. While in the Argentine he had furnished secret information to the British Intelligence and the American Embassy." The Court failed to remark that he had also dealt with the Germans and that as late as December of 1940 he had received a card personally from Prince Schaumbery-Lippe, adviser of the German Embassy in Buenos Aires (Record, pp. 5 and 7). On pages 43 and 44 he confirmed his relations to the German Embassy in the Argentine.

So it would appear that he had the confidence of the Embassies of all three governments and was working for all three. How he could have done that without double dealing is hard to understand. How he could justify a vocation calling for lying and deceit in view of the vows that he took as a priest of a great church is also difficult to understand. He professed to be a Ukrainian patriot working for the liberation of his country from the Bolsheviks. He was not interested in money, only an ideal (Record, p. 30) and yet he took \$50 from Kunze for services that he did not intend to render, and he informed against Vonsiatsky, a White Russian also working for the liberation of his country from the Bolsheviks. Moreover, the Government agents themselves seemed to have lost faith in their informer for after his visit to El Paso

in February, 1942, he was confined in the Immigration Station at Fort Howard, Maryland.

It would seem that the record of the priest would be such as to make him an unpredictable character, and yet the Government agents accepted his uncorroborated story as opposed to that of your petitioner who at least was a citizen, a resident of the country for upwards of twenty years, and one in whom those who knew him best had imposed confidence.

The Circuit Court of Appeals has summed up the evidence against your petitioner in several ways, but however it is summed it amounts to the addition of the evidence of "intent" to the evidence given by the priest. Neither alone, nor both together, should be held sufficient to establish that your petitioner knew of or participated in the conspiracy charge.

### **Jurisdiction.**

The jurisdiction of this Court is involved under Section 347 of Title 28 of the United States Code, providing *inter alia* for writs of certiorari to the Circuit Court of Appeals.

### **Questions Presented.**

I. Did the Circuit Court of Appeals err in deciding that the evidence against petitioner was substantial and justified the jury in rendering a verdict of guilty?

II. Ought the Circuit Court of Appeals to have affirmed the judgment of the District Court in view of the fact that it was based upon an attempt by an informer employed by the Government to entrap the petitioner, a law-abiding man, in the commission of a crime against the United States?

III. Was the Court of Appeals justified in deciding that petitioner had a fair trial?

### **Statutes Involved.**

The only statutes involved other than Section 347 of Title 28 of the United States Code giving jurisdiction to this Court to grant the certiorari are Section 34 and subsection (a) of Section 32 of Title 50 of the United States Code, under which the indictment was drawn.

### **Reasons Relied on for the Allowance of the Writ.**

The case presents serious questions in the administration of Federal criminal justice.

Those questions are as follows:

Where the charge is participation, with knowledge, in a criminal conspiracy, can a verdict of guilty be properly rendered where the only evidence of such participation rests on inferences from statements alleged to have been made by the defendant where there were other inferences to be drawn from the statement equally indicative of innocence, and there being no direct evidence of action by the defendant indicative of guilt?

And secondly, can a verdict of guilty be sustained where it rests not merely upon information obtained by an informer, but upon action on his part in endeavoring to secure the commission of crime by an otherwise law-abiding citizen? Under the decision of the court in *Sorrells v. United States*, 287 U. S. 435, ought not the District Court to have refused to exercise its judicial authority and disallowed the prosecution?

WHEREFORE your petitioner prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a complete transcript of the record and of all proceedings had therein; to the end that the cause may be reviewed by this Court, that

the judgment of the United States Court of Appeals be reversed and that your petitioner may be discharged from custody.

Dated May 27 , 1943.

KURT EMIL BRUNO MOLZAHN,  
*Petitioner.*

T. HENRY WALNUT,  
FRANCIS FISHER KANE,  
JAMES W. CARPENTER,  
CYRIL COLEMAN,  
*Attorneys for Petitioner.*



